(22)

No. 96-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. NATHAN L. HECHT, HON. JOHN CORNYN, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, HON. PRESCILLA R. OWEN, HON. JAMES A. BAKER, HON. GREG ABBOTT, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Whether the state's use of private funds held by attorneys in escrow for their clients implicates the Takings Clause of the Fifth Amendment to the United States Constitution.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of respondents. Consent has been granted by all of the parties: Mr. Richard Samp on behalf of Washington Legal Foundation and Mr. William Summers; Mr. Michael Mazzone *pro se*; Mr. Darrell Jordan on behalf of the Texas Equal Access to Justice Foundation, and Mr. W. Frank Newton; and the

Attorney General for the State of Texas for the Justices of the Texas Supreme Court. The consent letters have been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this case.[1]

PLF has participated in numerous cases involving constitutional protection of property rights before this Court. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*,[2] and *Suitum v. Tahoe Regional Planning Agency*.[3] PLF attorneys also represent petitioners in *Kim v. City of New York*.[4] PLF

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

[2] 483 U.S. 825 (1987).

[3] 65 U.S.L.W. 4385 (U.S. May 27, 1997) (No. 96-243).

[4] Appeal docketed, No. 96-1794.

participated as amicus curiae in *Agins v. City of Tiburon*,[5] *Keystone Bituminous Coal Association v. DeBenedictis*,[6] *Hodel v. Irving*,[7] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[8] *Lucas v. South Carolina Coastal Council*,[9] *Dolan v. City of Tigard*,[10] and *Babbitt v. Youpee*.[11]

PLF seeks to augment the argument in support of the petitioner. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional needed viewpoint with respect to the issues presented by this case.

STATEMENT OF THE CASE

The State of Texas' Interest on Lawyers' Trust Accounts (IOLTA) program requires lawyers to pool and deposit certain client funds into special interest-bearing accounts.[12] The state then commandeers the use of these depositors' property to generate interest that is paid to the Texas Equal Access to Justice Foundation (Foundation). The

[5] 447 U.S. 255 (1980).

[6] 480 U.S. 470 (1987).

[7] 481 U.S. 704 (1987).

[8] 482 U.S. 304 (1987).

[9] 505 U.S. 1003 (1992).

[10] 512 U.S. 374, 114 S. Ct. 2309 (1994).

[11] __ U.S. __, 117 S. Ct. 29 (1996).

[12] Tex. State Bar Rules Art. XI, § 5 (1997); Tx. R. Equal Access to Justice, Rule 6 (1997).

state's use of these private deposits through its mandatory IOLTA program generates revenue of as much as $10 million for the Foundation each year.[13]

Respondents object to the IOLTA program on the grounds that it constitutes an impermissible taking of private property in violation of the Fifth Amendment of the United States Constitution.[14] The Court of Appeals for the Fifth Circuit agreed, ruling that clients have a constitutionally protected property interest in the proceeds earned from the use of their funds in IOLTA accounts.[15]

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment to the United States Constitution is invariably violated "when some productive attribute or capacity of private property is exploited for state-dictated service."[16] The question raised by the present case is whether the owners of private funds, deposited in trust accounts and impressed into public service by the Texas IOLTA program, somehow lose an essential element of the

[13] *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 998-99 (5th Cir. 1996).

[14] The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. Amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment. *See Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 235-37 (1897).

[15] *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d at 1003-04.

[16] Jed Rubenfeld, *Usings*, 102 Yale L. J. 1077, 1114-15 (1993).

ownership of property and become less deserving of protection under the Takings Clause than owners of other forms of property.

One of the most essential attributes of private ownership is the right to make economically beneficial use of what one owns.[17] A necessary corollary of this right is the ability to exclude others from making beneficial use of one's property--a fundamental interest which this Court has frequently held cannot be abridged without implicating the Fifth Amendment.[18] The Texas IOLTA program impresses private funds into public use, using the earnings on these funds to pay for indigent legal services. Regardless of the legitimacy of the state's interest in this program, the means employed by the IOLTA scheme to use private property to finance a public program of legal services violates fundamental property interests protected by the Fifth Amendment.

[17] *Agins v. City of Tiburon*, 447 U.S. at 260; *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1031.

[18] *Nollan v. California Coastal Commission*, 483 U.S. at 831; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

ARGUMENT

BY APPROPRIATING THE USE OF PRIVATE FUNDS TO GENERATE REVENUE TO FINANCE PUBLIC SERVICES, TEXAS' IOLTA PROGRAM IMPLICATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Fifth Amendment Protects the Right of Private Property Owners to Make Economically Beneficial Use of What They Own and to Exclude Others from Making Beneficial Use of Their Property

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. One of the reasons for this provision is to prevent government, under the rationale of adjusting the benefits and burdens of economic life, from

> forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[19]

One of the essential attributes of ownership protected by the Takings Clause is the right to make use of what one owns. This Court has frequently observed that government actions

[19] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

that preclude an owner from making economically beneficial use of his property violate the Fifth Amendment.[20]

Conversely, this Court has consistently interpreted the Takings Clause to uphold the right of property owners to exclude others--most notably the government--from using their property. As Justice Brandeis observed, "[a]n essential element of individual property is the legal right to exclude others from enjoying it."[21] This interest, "so universally held to be a fundamental element of the property right," cannot be abridged by the state without implicating the Fifth Amendment.[22]

B. The Appropriation of the Economically Beneficial Use of Private Property by Government Implicates the Takings Clause

When a state, by law, denies owners the right to make beneficial use of their own property while simultaneously appropriating the use of that property to itself, that state has abridged the property owner's fundamental right to exclude.[23]

[20] *Lucas*, 505 U.S. at 1016 (citing *Agins v. City of Tiburon*, 447 U.S. at 260) (the Fifth Amendment is violated by regulations that deny an owner economically viable use of his property).

[21] *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[22] *Kaiser Aetna v. United States*, 444 U.S. at 179-80 . *See also Dolan v. City of Tigard*, 512 U.S. at 384 (the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting *Kaiser Aetna*, 444 U.S. at 176).

[23] *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 24-25 (1990) (O'Conner, J., concurring) (government's burdening of property that interferes with the right to exclude implicates the Fifth Amendment).

In *United States v. Causby*,[24] military aircraft flew training missions over the Causbys' property, preventing the owners from making beneficial use of their land as a chicken farm.[25] This Court held there was a taking requiring payment of just compensation because the farm was effectively appropriated for *use* by the military's training operations.[26]

Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[27] this Court held that a law permitting a third party to make use of a rooftop against the owner's will constituted a taking of property for which just compensation was required.[28] Even though the plaintiff in *Loretto* lost the use of a space amounting to slightly more than 1½ cubic feet, the state's intrusion on the right to exclude was found to implicate--and indeed to violate categorically--the Takings Clause.[29]

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[24] 328 U.S. 256 (1946).

[25] *Id.* at 259.

[26] [An easement of flight] would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be [] irrelevant .... The owner's right to possess and exploit the land--that is to say, his beneficial ownership of it--would be destroyed. ... In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

Id. at 262.

[27] 458 U.S. at 419.

[28] *Id.* at 421.

[29] *Id.* at 438 n.16.

C. The Texas IOLTA Program's Use of Private Funds Implicates the Takings Clause

1. Texas' IOLTA Program Precludes Private Depositors from Earning Interest While Appropriating to the State the Beneficial Use of Their Funds

Texas law does not preclude the earning of interest on private deposits. Rather, under the Texas IOLTA rules, client funds are pooled into an account for the benefit of the IOLTA program.[30] This account does not differ fundamentally from any other type of demand deposit save for the fact that it consists of privately owned funds impressed into public service.

If the IOLTA program did not exist, attorneys could employ their clients' funds for the fund owners' benefit. It is only because of the IOLTA rules that these deposits are not utilized to earn interest for the benefit of their owners. Instead the use of the deposits is exploited by the government to pay for a public program that does not directly benefit the property owners. This usurpation of the use of private property by the state, no matter what the measure of public good served, is inconsistent with this Court's interpretation of the Takings Clause.

2. The Value of the Individual Deposits Is Irrelevant

The State of Texas and its amici contend the IOLTA scheme does not implicate the Takings Clause because the private funds appropriated for use by the state may be in

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[30] Texas State Bar Rule 5(A).

amounts so small as to make the earning of interest by the individual depositors impracticable. However, as the Fifth Circuit in this case correctly observed, the Fifth Amendment does not place a minimum value on property protected under the Constitution.[31]

This Court has also rejected efforts to read a *de minimis* term into the Fifth Amendment. As previously noted, the Takings Clause was found to be violated in *Loretto* despite the minuscule area of the plaintiff's rooftop that had been appropriated for use to benefit the public.[32] Likewise, in *Hodel v. Irving*, this Court held that portions of the Indian Land Consolidation Act violated the Takings Clause even though the value of the individual ownership interests was *de minimis*.[33]

Owners of financial deposits, no less than owners of land, are protected by the Constitution against having their property pressed into service by the government, to be put to economic use for the benefit of the state.

CONCLUSION

Although federal banking rules permit individuals to earn interest on short term deposits of small amounts of money, the State of Texas prohibits one class of depositors from earning such interest. Instead, Texas commandeers the use of these depositors' property and employs the federal banking rules to earn interest for the state. Thus, Texas prohibits economically beneficial use of these private deposits by the owners and instead coopts such use exclusively for itself. Such

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[31] *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d at 1002 (footnote omitted).

[32] 458 U.S. at 438.

[33] 481 U.S. at 714.

a scheme implicates the Fifth Amendment's protection of the right to make beneficial use of one's private property and to exclude others.

The Texas IOLTA program declares that clients entrusting to their attorneys certain funds have no property interests in the use of those funds. However, a state cannot defeat the constitutional prohibition against using property without just compensation by the simple device of asserting that the property owner had no right to the use or the profits therefrom.[34] The state's impressing of privately deposited funds into public service does not differ in kind from a law that impresses a coal mine or a rooftop into public service.

This case presents this Court with the opportunity to reaffirm that the Takings Clause is violated when private property is impressed into public service. This Court should affirm the decision of the Court of Appeals holding that the Texas IOLTA program implicates the Fifth Amendment.

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[34] *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).